Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-399

WILBUR McDONALD,

Petitioner,

vs.

STATE OF ILLINOIS, CITY OF CHICAGO, COUNTY OF COOK, EDWARD V. HANRAHAN, BERNARD M. CAREY, JOSEPH WOODS, RICHARD ELROD, DEPARTMENT OF CORRECTIONS OF COOK COUNTY, DANIEL WEIL, JAMES ROCHFORD, JAMES CONLISK, and WILLIAM ARNOS and GERALD SATERNOS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FREDERICK F. COHN
CAROLYN JAFFE
35 East Wacker Drive
Chicago, Illinois 60601

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit entered in this cause.

Opinion Below

The opinion of the United States Court of Appeals for the Seventh Circuit is set forth as an Appendix.

Jurisdiction

The Court of Appeals' opinion was decided June 15, 1977. No petition for rehearing was filed. This Petition is filed within 90 days after entry of judgment. Jurisdiction is invoked pursuant to 28 U.S.C. 1254(1), 2101(c), and Rule 22.3 of the Rules of this Court.

Questions Presented For Review

1. Where an innocent person was convicted and imprisoned for a crime he did not commit, may he win redress against the State in the federal courts for the wrongs he suffered in violation of his federally guaranteed constitutional rights?

2. May a State, the Constitution of which recently changed the law so as to abolish sovereign immunity, assert the defense of sovereign immunity for the first time in the Court of Appeals, where such was not raised below?

   A. Is *Edelman v. Jordan*, 415 U.S. 651 (1974), applicable?

   B. If so, should that decision be reconsidered, since a holding that the State has not waived a defense not raised below amounts to denial of

equal protection of the laws when juxtaposed with decisions strictly applying waiver doctrine against defendants in criminal cases?

3. May a State consistent with federal constitutional requirements, impose a liability ceiling on recovery for wrongful imprisonment, while not imposing such ceiling for redress against the State for other kinds of tortious conduct?

Constitutional Provisions and Statutes Involved

The Eleventh Amendment to the United States Constitution provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "[N]o State shall . . . deprive any person of . . . liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 13, sec. 4 of the Illinois Constitution of 1970 provides:

> "§ 4. Sovereign Immunity Abolished
>
> Except as the General Assembly may provide by law, sovereign immunity in this State is abolished."

Chap. 37, sec. 439.8, Illinois Revised Statutes provides, in pertinent part:

> "The court [of claims] shall have exclusive jurisdiction to hear and determine the following matters:
>
> * * *

(c) All claims against the State for time unjustly served in prisons of this State where the persons imprisoned shall receive a pardon from the governor stating that such pardon is issued on the ground of innocence of the crime for which they were imprisoned; provided, the court shall make no award in excess of the following amounts: for imprisonment of 5 years or less, not more than $15,000; for imprisonment of 14 years or less but over 5 years, not more than $30,000; for imprisonment of over 14 years not more than $35,000; and provided further, the court shall fix attorney's fees not to exceed 25% of the award granted."

(d) All claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit, and all like claims sounding in tort against the Medical Center Commission, the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System or the Board of Governors of State Colleges and Universities; provided, that an award for damages in a case sounding in tort shall not exceed the sum of $100,000 to or for the benefit of any claimant. The defense that the State or the Medical Center Commission or the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities Systems or the Board of Governors of State Colleges and Universities is not liable for the negligence of its officers, agents, and employees in the course of their employment is not applicable to the hearing and determination of such claims."

Statement Of The Case

This petition seeks review of an opinion of the Court of Appeals for the Seventh Circuit affirming (in part) the District Court's dismissal of petitioner's Complaint[1] pursuant to the Civil Rights Act, 42 U.S.C. 1983, and under general federal question jurisdiction, 28 U.S.C. 1331. (As to that portion of the opinion and judgment reversed and remanded for further proceedings as to a single defendant, see opinion, p. 14, review is not sought herein.)

Petitioner sued a number of individual defendants and governmental agencies, asserting that he had been wrongfully convicted of a crime (murder) of which he was later proven innocent. Petitioner spent 3 years and 35 days wrongfully incarcerated for this offense of which he was wholly innocent. He was eventually pardoned by the Governor of Illinois on grounds of innocence. While petitioner also has an action pending in the Illinois Court of Claims for redress for such wrongful incarceration, the applicable State statute limits recovery in such cases to approximately $3,000 per year in custody.[2]

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[1] No. 75 C 2755 (R. 1) "R." refers to the Record on Appeal. The case was disposed of below on pleadings and affidavits; there is no Transcript of Proceedings.

[2] The statute, Chap. 37, sec. 439.8, Ill. Rev. Stat., set out *supra* in pertinent part, provides, *inter alia*, that for wrongful imprisonment of 5 years or less, recovery shall be limited to $15,000.00.

Statement Of Facts

The pertinent facts necessary to resolution of the questions herein presented are fully contained in the Opinion (App.), and are not repeated here to avoid unnecessary duplication.

Reasons For Granting The Writ

1.

The imprisonment of an innocent man for a crime he did not commit is a violation of due process which must be compensated for by the State responsible for such incarceration.

The Court of Appeals expressly declined to rule on the merits of petitioner's claim for redress, holding instead that sovereign immunity barred suit against the State (see Point 2, *infra*), (Op. p. 7). Because the Complaint depends upon the compensability of the wrongs petitioner suffered as a man innocent but imprisoned, a brief resumé of the merits is necessary to place the balance of this Petition in proper perspective.

The essence of petitioner's right to recovery is that he is an innocent man, wrongfully incarcerated. His innocence is not even subject to question.

This circumstance, in and of itself, even absent specific and/or identifiable wrongful conduct by government officials, *must* constitute a cause of action. Due

process will not countenance such wrongful deprivation of liberty, without adequate compensation.[3]

It is immaterial that at common law, an innocent man had no right to proceed against a governmental body for the "tort" of his factually wrongful incarceration. The continual evolution of due process is the living essence of our democracy. See *Frank v. Maryland*, 359 U.S. 360, 371 (1959); *Rochin v. California*, 342 U.S. 165, 169 (1951); *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 162-63 (1951) (concurring opinion of Mr. Justice Frankfurter).

Accordingly, this Court consistently has interpreted the Constitution in a flexible manner. See, *e.g.*, *Rochin v. California, supra; Miranda v. Arizona*, 384 U.S. 436 (1966); *Wong Sun v. United States*, 371 U.S. 471 (1963); *United States v. Wade*, 388 U.S. 218 (1967); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *Mapp v. Ohio*, 367 U.S. 643 (1961). See also *United States v. Toscanino*, 500 F.2d 267 (2 Cir. 1974).

In fashioning these new rights, the Court looks to the fabric of our society, holding that what once was tolerated no longer can satisfy due process.

Due process no longer can countenance depriving a man of liberty and of his good name, preventing him from holding employment, invading his right of privacy, and numerous other "torts" necessarily involved with lengthy incarceration—without adequate compensation for such "torts"—no matter how fair or "due" is the "process" that resulted in his incarceration.

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[3] Of course, for such a grievous wrong, *no* monetary compensation is ever "adequate." And here, of course, petitioner had to live under the onus of a sentence of 100 to 150 years.

If a defendant is so harmed by a delay in prosecution that due process is violated,[4] so too, is an innocent person harmed by incarceration for over 3 years, and due process is at least equally violated.

Admittedly, police, prosecutors, and jurors can and do make mistakes. But mistakes are made, perhaps because in our urban industrialized society, it seems that we cannot afford to expend, in every case, sufficient funds for the type of investigation which would render such miscarriage of justice well nigh impossible. But due process cannot permit the innocent person wrongfully convicted to pay the price for the rest of society. He must be adequately compensated.

The legal proceeding which deprived plaintiff of his liberty and subjected him to all the horrors which naturally flow from 3 years incarceration, was captioned:

"People of the State of Illinois v. Wilbur McDonald."

As the People arrested him, prosecuted him and incarcerated him, so must the People compensate him for the harm they caused him. And they caused him harm whether or not, individually, they were proceeding in a proper manner,[5] for the end result was most improper—the incarceration of an innocent man.

At the very least, the court should have held a hearing to determine how this unconscionable result could have occurred. For where an innocent person is wrongfully

[4] In *United States v. Marion*, 404 U.S. 307, 320 (1971), the Court recognizes that a citizen can be harmed by the State's failure to prosecute or delay in prosecution even where such does not demonstrably interfere with his defense. And in *Klopfer v. North Carolina*, 386 U.S. 213 (1967), holding due process could be violated by the effects (public scorn, deprivation of employment) of the pendency of an unprosecuted charge.

[5] *Cf. Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Barbee v. Warden*, 331 F.2d 842, 846 (4 Cir. 1964).

convicted, the doctrine of *res ipsa loquitur* necessarily applies requiring the result that the totality of governmental action caused the harm.

Genuine cases of wrongful imprisonment, as at bar, are few and far between. But for the unfortunate, nay, accursed man who finds himself in the prison cell meant for another, once his innocence has been vindicated in theory by his release, the government of our land must recognize a right of constitutional recovery against the State that put and kept him there. The evolving concept of a living due process demands no less.

Certiorari should be allowed so that this Court may speak to this compelling due process issue.

2.

The suit was not barred by sovereign immunity. Certiorari should be allowed to reconsider *Edelman v. Jordan*, 415 U.S. 651 (1974), to the extent that that decision be deemed to countenance the court's holding that such defense barred the suit though raised for the first time on appeal.

Sovereign immunity, as recognized by the Eleventh Amendment, was held to bar petitioner's complaint, though raised by respondents for the first time on appeal. (Op. p. 7)

However, such bar no longer exists in Illinois by virtue of the Illinois Constitution of 1970, Art. 13, sec. 4: "Except as the General Assembly may provide by law, sovereign immunity in this State is abolished."[6]

[6] The official text of the proposed Constitution, along with appropriate explanations, distributed to all Illinois voters, included the following explanation of this section: "This reverses Article IV, Section 26 of the 1870 Constitution by permitting anyone to sue the State, as provided by law." There could hardly be a more definite statement abolishing sovereign immunity.

Edelman v. Jordan, 415 U.S. 651 (1974), is not even applicable, since it only applies to nonconsenting States. *Id.* at 663. By virtue of the Illinois constitutional and statutory scheme, *the State has indeed consented* to submit itself to the very sort of claim presented in petitioner's complaint. See Ill. Const. of 1970, Art. 13, sec. 4; Ill. Rev. Stat., Chap. 37, sec. 439.8.

But to the extent that *Edelman v. Jordan, supra*, may be deemed applicable, certiorari should be allowed so the court may reconsider its holding in the light of intervening decisions and evolving due process concepts. Respondents' failure to raise the defense in the District Court foreclosed petitioner from the opportunity to challenge it at the earliest possible opportunity. Recent decisions strictly imposing the waiver doctrine against defendants in criminal cases[7] raise serious questions of due process and equal protection, if a State at the same time is deemed able still to raise on appeal the sovereign immunity defense not raised below.

The State must be held to the same waiver standards as are criminal defendants; any other result violates due process of law and equal protection of the laws.

3.

The Illinois statutory limitation on the amount that an innocent person may recover for having been imprisoned for a crime he did not commit violates due process of law and equal protection of the laws.

The Illinois statute limiting liability in cases of wrongful imprisonment, Ill. Rev. Stat. chap. 37, sec. 439.8 (set forth at pp. 3-4, *supra*), is unconstitutional

[7] *E.g., Estelle v. Williams*, 425 U.S. 501 (1976); *Francis v. Henderson*, 425 U.S. 536 (1976).

because it singles out recovery for this special type of tort from all other recoveries against the State for torts generally. Compare subsection (c), with subsection (d), of the statute.

Since there is no rational basis whatsoever for such distinction, the statutory scheme violates equal protection of the laws, guaranteed by the Fourteenth Amendment.

The provision limiting recovery is further unconstitutional because it is available only after one has obtained a pardon. The executive authority to pardon is totally discretionary; pursuant to the Illinois Constitution of 1970, Art. 5, Sec. 12, a governor does not have to pardon a person, even where there is no dispute that he was innocent. This limitation on the statutory right of recovery violates both the concept of separation of powers and due process, for the judicial remedy is made dependent on executive action, and a remedy which can be granted or denied on the whim of an official—without any standards—violates due process.

The limitations imposed by Chap. 37, Sec. 439.8, Ill. Rev. Stat., upon the right of recovery of an innocent person convicted of a crime he did not commit, are therefore unconstitutional and void.[8]

* * *

Since these limitations are void, and sovereign immunity has been abolished in Illinois, see Point 2, *supra*, an innocent person, wrongfully imprisoned—as was petitioner herein—has a right to full recovery for damages. Certiorari should therefore be allowed.

[8] Neither the district court nor the Seventh Circuit reached this issue.

Conclusion

For any or all of the foregoing reasons, certiorari should be allowed to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

FREDERICK F. COHN
CAROLYN JAFFE
35 East Wacker Drive
Chicago, Illinois 60601

Attorneys for Petitioner

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 76-1265

WILBUR MCDONALD,

Plaintiff-Appellant,

v.

STATE OF ILLINOIS, CITY OF CHICAGO, COUNTY OF COOK, EDWARD V. HANRAHAN, BERNARD M. CAREY, JOSEPH WOODS, RICHARD ELROD, DEPARTMENT OF CORRECTIONS OF COOK COUNTY, DANIEL WEIL, JAMES ROCHFORD, JAMES CONLISK, and WILLIAM ARNOS and GERALD SATERNOS,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75-C-2755—**William J. Lynch**, *Judge.*

ARGUED OCTOBER 22, 1976—DECIDED JUNE 15, 1977

Before CLARK, *Associate Justice (Retired),** FAIRCHILD, *Chief Judge,* and HASTINGS, *Senior Circuit Judge.***

* The Honorable Tom C. Clark, Associate Justice (Retired) of the Supreme Court of the United States, sat by designation. This opinion was approved by Mr. Justice Clark and delivered to the Clerk for publication June 8, 1977 prior to his death.

** Senior Circuit Judge John S. Hastings heard oral argument and participated in the conference of the court, but died before this opinion was submitted to him for approval.

FAIRCHILD, *Chief Judge.* Plaintiff, Wilbur McDonald, brought this civil rights action pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment against the State of Illinois, Cook County, the City of Chicago, the Cook County Deparment of Corrections and various county and city officials. Jurisdiction was claimed under 28 U.S.C. § 1331 as well as § 1343. Plaintiff claims that defendants arrested, convicted and sentenced him for a crime he did not commit, and, therefore, deprived him of his right to liberty, as well as other constitutional rights. He seeks money damages. The district court granted summary judgment as to certain defendants, and as to those remaining, dismissed the complaint for failure to state a claim upon which relief could be granted. We reverse the dismissal of the case against defendant Daniel Weil. We affirm all other dismissals and the grants of summary judgment.

I. *The Facts Leading to Plaintiff's Conviction for Murder and His Subsequent Pardon*

On July 11, 1970, Chicago police officers arrested Wilbur McDonald and charged him with the murder of Agnes Lehmann. Mrs. Lehmann's body had been found in a wooded area of Grant Park in downtown Chicago. Earlier, plaintiff had been found, semiconscious, on railroad tracks near Grant Park. Police had taken him to a hospital where the arrest was subsequently made.

Plaintiff states that he happened to be in Grant Park on the day of Mrs. Lehmann's murder because he was seeking a cool refuge from July heat. Originally, he planned to go to the beach, but claims he was robbed on the way, a matter he reported to defendants William Arnos and Gerald Saternos, both Chicago police officers. Instead, then, he entered Grant Park where he claims to have been beaten by several men and again robbed. During his escape, which apparently took him near or through the wooded area where Mrs. Lehmann's body lay, plaintiff lost a shoe and his clothes somehow came in contact with the victim's blood. He collapsed at railroad tracks near the park.

On August 17, 1971, plaintiff was tried and convicted of the murder of Agnes Lehmann in the Circuit Court of Cook County. He was sentenced to 100-150 years imprisonment.

Close to two years later, in August, 1973, Lester Harrison, who was arrested by police in connection with a murder in Grant Park, confessed to the 1970 murder of Agnes Lehmann. When the State's Attorney for Cook County learned of Harrison's confession, he agreed to McDonald's release from custody. McDonald was thus freed on August 15, 1973. He was granted a new trial in which the state moved to *nolle prosse.* One year later, on August 19, 1974, the Governor of Illinois granted McDonald a full pardon "based on innocence."

II. *The Nature of Plaintiff's Claim*

Plaintiff filed this suit on August 15, 1975. Simultaneously pending was his action for damages against the State of Illinois in the Illinois Court of Claims. The thrust of plaintiff's complaint in both suits is that the imprisonment of an innocent man for a crime which he did not commit is a violation of due proces which must be compensated for by the state which is responsible for the incarceration.

Also alleged in the federal complaint is wrongdoing on the part of the various city and county officials named as defendants. Plaintiff claims that since this wrongdoing occurred while defendants were acting under color of state law, and since the result of the wrongdoing was the conviction and imprisonment of plaintiff for a crime he did not commit, the officials are liable to compensate plaintiff. Specifically, plaintiff alleges (1) that he was arrested and a blood sample taken without probable cause; (2) that his clothes were seized and fingernail scrapings taken without a warrant; (3) that he was denied adequate legal representation, in that defendant Daniel Weil, then Superintendent of the Cook County Department of Corrections, prevented his counsel from taking photographs of plaintiff shortly after his arrest, which photographs would have tended to corroborate plaintiff's testimony that he was beaten near the scene of

the murder; (4) that he was deprived of his due process right to access to exculpatory evidence by the refusal of defendant police officers William Arnos and Gerald Saternos to discuss facts they knew prior to their testimony, and by their failure properly to report their initial encounter with plaintiff; and (5) that members of the Chicago Police Department and the State's Attorney's Office of Cook County failed fully to investigate plaintiff's version of what had occurred.

III. *The Adequacy of Plaintiff's Claim Against the State of Illinois*

The district court dismissed the case against the State of Illinois on the ground that plaintiff had failed to state a claim for which relief could be granted. Plaintiff's complaint alleges that by virtue of his imprisonment for a crime he did not commit, the State of Illinois deprived him of liberty in violation of the Fourteenth Amendment. Plaintiff apparently now concedes that no procedural flaws existed in his apprehension or conviction. But he argues that even absent such flaws, when the system results in the imprisonment of an innocent man, due process has been denied.[1] Accordingly, he seeks damages.

We must first consider certain procedural obstacles to any private claim brought against this particular defendant. Private actions for damages against the states have traditionally been barred from the federal courts by the doctrine of sovereign immunity as inferred from the Eleventh Amendment:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

While the Amendment by its terms does not bar suits against a state by its own citizens, the Supreme Court

[1] Plaintiff's counsel, at oral argument, conceded that he could cite no case thus far decided which so interpreted due process.

has consistently extended the concept of sovereign immunity to such suits. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) (and cases cited therein).

The federal courts can exercise jurisdiction, however, in cases where the state waives its immunity. *Cf. Edelman v. Jordan, supra*, at 663 (1974). Plaintiff cites us to Article 13, Section 4 of the Illinois Constitution of 1970 as evidence of that state's waiver of sovereign immunity. We have considered the section and find that while it does waive sovereign immunity, the waiver is made subject to such limitations as the state legislature may impose. Section 4 provides:

> *Except as the General Assembly may provide by law*, sovereign immunity in this State is abolished. [Emphasis added.]

And indeed, the General Assembly of Illinois has provided that in cases such as this, where damages are sought for wrongful imprisonment, sovereign immunity is waived only as to suits brought in the Illinois Court of Claims:

> The court [of claims] shall have exclusive jurisdiction to hear and determine the following matters:
> . . .
> (c) All claims against the State for time unjustly served in prisons of this State where the persons imprisoned shall receive a pardon from the governor stating that such pardon is issued on the ground of innocence of the crime for which they were imprisoned.
> . . .

Ill. Rev. Stat., Ch. 37, § 439.8. Moreover, the Assembly has limited the amount of damages which can be awarded in cases of wrongful imprisonment to $15,000 for wrongful imprisonment of five years or less, to $30,000 for five to fourteen years, and to $35,000 for more than fourteen years. Ill. Rev. Stat., Ch. 37, § 439.8.

Plaintiff nevertheless contends that sovereign immunity does not bar him from pursuing this federal suit because he claims that the monetary limitations on

recovery imposed by section 439.8 are unconstitutional, (1) because Art. 13, Sec. 4 of the Illinois Constitution was not intended to allow the legislature to limit the amount of potential state liability, and (2) because the Equal Protection Clause of the Fourteenth Amendment prohibits the states from drawing irrational distinctions in the treatment of citizens. In the latter respect, plaintiff argues that it is irrational for the State of Illinois to single out the tort of wrongful imprisonment and tell citizens who suffer such harm that their recovery against the state is limited, while citizens who suffer other forms of tortious injury at the hands of the state are not subject to the same limitations.

In considering whether or not plaintiff's suit against the State of Illinois is barred by sovereign immunity, we begin our analysis by noting that plaintiff does not challenge the decision of the General Assembly of Illinois to limit the forum in which the state can be sued. Indeed, we do not think plaintiff could successfully challenge this limitation. It has long been recognized that states can limit their waiver of sovereign immunity to actions brought in their own courts and, indeed, even as to particular state courts. *See e.g., Petty v. Tennessee Missouri Bridge Commission*, 359 U.S. 275 (1959). Thus, we must conclude that even if we were somehow empowered to render a decision on the constitutionality of the Illinois law limiting the amount of recovery in cases of wrongful imprisonment brought against the state, we would still have no power to consider the merits of plaintiff's substantive case or to award damages because the State of Illinois has in no way conceded to us the power so to act. Section 439.8 is quite specific in limiting jurisdiction in cases such as this to the Illinois Court of Claims. It is the Illinois Court of Claims alone then that can consider the merits of plaintiff's case. And so, we believe it must be the Court of Claims that considers the constitutionality of any attempt by the state legislature to limit the amounts it can award in damages.

Plaintiff further argues that defendant's counsel's failure to raise sovereign immunity in the district court bars its invocation at the present stage of the proceed-

ing. We do not agree. In *Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459 (1945), sovereign immunity was not argued by the State of Indiana until the suit was before the Supreme Court. Nevertheless, the Court found:

> This was in time . . . . The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court.

Id. at 467. The failure of state's counsel to raise a sovereign immunity defense at the trial stage would be significant only if the state had empowered counsel to waive its immunity. *Cf. Ford Motor Co. v. Dept. of Treasury of Indiana, supra*, at 466-69. Plaintiff has not cited any state law vesting in the Attorney General of Illinois the power to waive that state's sovereign immunity, nor have we found any such law.

Accordingly, without expressing any view as to the merits of plaintiff's claim, we affirm the dismissal of the district court as to the State of Illinois because we conclude that exercise of federal jurisdiction is barred by the Eleventh Amendment.

IV. *The Adequacy of Plaintiff's Claim Against Individual Defendants*

Pursuant to 42 U.S.C. § 1983, plaintiff seeks damages against a number of city and county officials for alleged deprivation of constitutional rights while acting under color of state law. We find the law to be clear that for plaintiff to state a cognizable claim, he must allege more than mere negligence on the part of these defendants. *See Wood v. Strickland*, 420 U.S. 308, 322 (1975); *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir. 1976); *Thomas v. Pate*, 516 F.2d 889, 891 n. 2 (7th Cir. 1975), *cert. denied*, 423 U.S. 877 (1975). Indeed, in the case of supervisory officials, he must allege some personal involvement in the deprivation. *See Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971).

A. *Defendants Hanrahan and Carey*

We have considered plaintiff's complaint and do not find it adequate to state a claim with respect to defendants Edward Hanrahan and Bernard Carey, past and present State's Attorney for Cook County. At most, plaintiff alleges that the State's Attorney's office failed adequately to investigate plaintiff's version of what transpired on July 11, 1970. He does not allege that this was intentional or reckless on defendant's part. Moreover, as defendants note, even if every part of plaintiff's story of having been the victim of multiple thefts had been checked out and found true, it was not inconceivable that he could still have been involved in the murder of Mrs. Lehmann. He was found near the crime, certain personal effects, notably his shoe, were found near the victim's body, and the victim's blood was found on his clothing. In this light, there is no reason to read an implied charge of recklessness into plaintiff's complaint.

The duty of the prosecutor is to bring to trial those individuals whom he reasonably believes are guilty of the crime with which they are charged. So long as he acts within the scope of this duty, he is immune from civil liability. *See Cawley v. Warren*, 216 F.2d 741 (7th Cir. 1954). Nothing in plaintiff's complaint suggests that defendants Hanrahan or Carey abused their offices or departed from this duty with respect to plaintiff, and therefore, we conclude they are immune from liability and we affirm the district court's dismissal of the complaint against them.

B. *Defendants Arnos and Saternos*

Similarly, we find the complaint inadequate to state a claim as against defendants William Arnos and Gerald Saternos, members of the Chicago police force. Plaintiff alleges that Arnos and Saternos were remiss in failing to file a report about the robbery of which plaintiff informed them. Moreover, plaintiff complains that the two policemen's refusal to talk with plaintiff prior to trial, when they were the only witnesses who could corroborate his story about being robbed, was to deny him exculpatory evidence.

As to the first allegation, without expressing any view as to whether a police officer's intentional and invidious failure to file a robbery report could state a constitutional claim, we must find the complaint deficient as alleging no more than possible negligence on the part of the named defendants. Plaintiff never suggests that the police officers intentionally failed to file a report or were reckless in not so doing.

As to the second allegation, we find that no damage has been alleged. Plaintiff may not have spoken with defendants Arnos and Saternos prior to trial, but he did know that these two officers were aware of his having been robbed on July 11th. There is no allegation that their trial testimony did anything but corroborate plaintiff's own story. Accordingly, we must affirm the dismissal as to these defendants.

C. *Defendants Rochford and Conlisk*

The district court granted summary judgment in favor of defendants James Rochford and James Conlisk, present and past Chiefs of Police of the City of Chicago. As noted in the court's memorandum opinion, plaintiff has done no more than list these individuals as defendants in the caption of his complaint. No facts pertaining to them are alleged in the body of the complaint, certainly none alleging personal involvement in the wrongdoing attributed to their subordinates, such as is required to maintain a section 1983 claim. *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971). In fact, defendants Rochford and Conlisk have filed sworn affidavits asserting that they had no personal involvement in the activities which gave rise to plaintiff's claim. On appeal, plaintiff has made no argument that the district court erred in granting summary judgment. In this light, and because we agree with the district court's findings that the papers filed in this case present no genuine issue as to any material fact, we affirm the grant of summary judgment as to these two defendants.

D. *Defendants Elrod and Woods*

Defendants Richard Elrod and Joseph Woods are the past and present Sheriffs of Cook County. Here again, though plaintiff lists these individuals as defendants in the caption of his case, he makes no specific allegations of wrongdoing on their part, or personal involvement in the wrongdoing of others, in the body of his complaint, nor does he, on this appeal, argue error in the district court's decision to dismiss. We agree with the district court, that absent any such allegations, the complaint must be dismissed as to these defendants.

E. *Defendant Weil*

As against defendant, Daniel Weil, former Superintendent of the Cook County Department of Corrections, plaintiff alleges that defendant's refusal to allow plaintiff's counsel to photograph plaintiff shortly after his arrest, and thus to obtain evidence to corroborate his own testimony that he had been beaten by unknown assailants, deprived plaintiff of his constitutional right to the effective assistance of counsel in the making of his defense. The district court found that Weil, as Superintendent of the Cook County Department of Corrections, was vested with the authority to promulgate such rules and regulations as he deemed proper for the administration of the institutions over which he exercised control, and therefore, that the refusal to allow plaintiff's counsel to photograph plaintiff was within his discretion and did not constitute violation of a right cognizable under section 1983.

We cannot agree. A defendant's right to prepare the best defense he can and to bring to the court's attention any evidence helpful to his case is constitutionally protected. The Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963) recognized the right of a defendant to have access to exculpatory evidence in the hands of the prosecutor. We believe a defendant also has the right to *preserve* possibly exculpatory evidence and that, to the extent the government or its agents frustrate such preservation, the defendant has a constitutional claim.

In this case, it was important to the defense plaintiff made at the Lehmann murder trial that he show he had been beaten and twice robbed on the day he was arrested for the crime. His own testimony to this effect would have been corroborated had he been able to introduce a photograph of himself taken shortly after his arrest and showing the physical effect of the claimed beating. Thus, for defendant Weil to deprive plaintiff of the opportunity to obtain such a photograph, impaired plaintiff's right to present his defense.

We recognize that there will be questions as to the extent of damages for which defendant Weil is responsible. The essential problem is the extent to which the lack of a photograph contributed to the guilty verdict and, thus, to plaintiff's imprisonment. This matter is complicated by the fact that, as both parties seem to agree, at some point before trial McDonald's counsel sought a court order to allow him to photograph plaintiff, and this request was denied. It might be that at that point, defendant Weil would no longer be responsible for plaintiff's inability to obtain a photograph and therefore not be liable for full damages. But we do not believe it appropriate for us here to attempt to regulate the apportionment of the responsibility for plaintiff's inability to obtain a photograph of himself. Neither do we foreclose Weil from establishing, if he can, a *Wood v. Strickland*, 420 U.S. 308 (1975) defense. We conclude only that insofar as defendant Weil prevented plaintiff's counsel from photographing his client, plaintiff has stated a cause of action against him. Accordingly, we reverse the district court's dismissal of the action against Weil.

V. *Adequacy of Plaintiff's Claims Against Governmental Entities*

Plaintiff has no cause of action, created by 28 U.S.C. § 1983, against the City of Chicago, Cook County, or the Department of Corrections of Cook County. This proposition rests on statutory construction, a municipality not being a "person" as the word is used in that statute. *Monroe v. Pape*, 365 U.S. 167 (1961), *Accord Moor v. County of Alameda*, 411 U.S. 693 (1973); *City of Kenosha v. Bruno*, 412 U.S. 507 (1973).

A cause of action (without benefit of 28 U.S.C. § 1983) may be implied in favor of one who suffers injuries as a result of a government agent's violation of the Constitution. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). If the requisite jurisdictional amount is present, the cause of action may be prosecuted in a federal court. *Hostrop v. Bd. of Jr. College Dist. No. 515*, 523 F.2d 569, 577 (7th Cir. 1975).

In *Hostrop*, the governmental entity was sued, and held liable, while a *Wood v. Strickland*, 420 U.S. 308 (1975) defense was sustianed as to the individual members of the governing board. The governing board of the entity had itself taken the action which deprived plaintiff of a property right, without due process. Thus the responsibility of the entity arose directly out of the action of its governing board. It might well not be an unreasonable extension of *Hostrop* to hold a similar governmental entity liable for the deprivation of a constitutional right perpetrated by an inferior employee when his act was required by a policy adopted by the governing board.

With respect to the City of Chicago, as already explained, there is no adequate allegation of a deprivation of plaintiff's constitutionally protected rights by any agent of the City. Although we have found a sufficient claim stated against Weil, there is no allegation that any policy of Cook County (or of the County Department of Corrections, if that be deemed a separate entity) required Weil to refuse an opportunity to photograph plaintiff.

It seems to us that Cook County (or the Department) did not itself violate the Constitution, nor impair plaintiff's constitutionally protected rights. If liability is to be imposed on it under federal law for injury caused by Weil's act, it would have to be on a theory that imposition of vicarious liability on a governmental entity is an appropriate and necessary prophylactic against constitutionally improper acts of its agents.

We are not aware of any decision which holds a local government entity liable in money damages for the constitutional deprivations committed by its agents, independently of any official policy. The principle of *respondeat superior* has not been applied under § 1983, although it must be noted that the opportunity to apply it to municipal bodies was foreclosed by the statutory interpretation that such bodies were not subject to § 1983 liability. *But see* Note, *Damages Remedies Against Municipalities for Constitutional Violations*, 89 Harv. L. Rev. 922, 931-35 (1976).

It can be argued with some force that imposition of liability on the governmental entity is desirable in order to promote obedience to the Constitution by agents and employees. If those who manage a government entity know that individuals whose rights are violated by agents and employees will receive compensation out of the public treasury, those in charge will have an incentive to provide supervision to keep constitutional violations to a minimum. The exclusionary rule is a somewhat comparable judicially imposed prophylactic. When an officer who acts under color of state law obtains evidence in violation of the Constitution, the state and public, and not just the officer, must "atone" for the wrongdoing by being denied the use of the evidence against the person wronged. *E.g. Mapp v. Ohio*, 367 U.S. 643 (1961); *cf. Elkins v. United States*, 364 U.S. 206, 217 (1960); *Weeks v. United States*, 232 U.S. 383 (1914).

Notwithstanding the argument just outlined, however, we consider that the implication of a federal judicial remedy to the extent which would be necessary to impose liability on Cook County here would be out of harmony with the doctrine built up under § 1983, a drastic extension of the decided cases, and we are not persuaded of the existence of a sufficient need.

VI. *Conclusion*

We reverse the dismissal as to defendant Daniel Weil and remand for further proceedings. In all other respects we affirm.

Costs on this appeal are allowed to the State of Illinois and the City of Chicago. As to defendants Cook County, Edward Hanrahan, Bernard Carey, Joseph Woods, Richard Elrod, the Cook County Department of Corrections and Daniel Weil, all represented by the State's Attorney, such defendants are allowed two-thirds of their costs on appeal, and plaintiff is allowed one-third of his costs.

AFFIRMED IN PART;
REVERSED IN PART.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

Opinion by Judge Fairchild

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 15, 1977

Before

Hon. TOM C. CLARK, Associate Justice (Retired)*

Hon. THOMAS E. FAIRCHILD, Chief Judge

Hon. JOHN S. HASTINGS, Senior Circuit Judge**

WILBUR McDONALD,
Plaintiff-Appellant,

No. 76-1265 vs.

STATE OF ILLINOIS, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 75-C-2755
WILLIAM J. LYNCH, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART and REVERSED IN PART, in accordance with the opinion of this court filed this date. Costs on this appeal are allotted in accordance with the final paragraph of this opinion.

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* The Honorable Tom C. Clark, Associate Justice (Retired) of the Supreme Court of the United States, sat by designation. This opinion was approved by Mr. Justice Clark and delivered to the Clerk for publication June 8, 1977 prior to his death.

** Senior Circuit Judge John S. Hastings heard oral argument and participated in the conference of the court, but died before this opinion was submitted to him for approval.

FPI-81—6-7-77-200-054

SUPREME COURT, U. S.
FILED
OCT 7 1977
MICHAEL RODAK, JR., CLERK

No. 77-399

In the

Supreme Court of the United States

OCTOBER TERM, 1976

Wilbur McDonald,

Petitioner,

vs.

State of Illinois, City of Chicago, County of Cook, Edward V. Hanrahan, Bernard M. Carey, Joseph Woods, Richard Elrod, Department of Corrections of Cook County, Daniel Weil, James Rochford, James Conlisk, William Arnos and Gerald Saternos,

Respondents.

On Petition For A Writ Of Certiorari To
The Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS COUNTY OF COOK, EDWARD V. HANRAHAN, BERNARD M. CAREY, JOSEPH WOODS, RICHARD ELROD, DEPARTMENT OF CORRECTIONS OF COOK COUNTY and DANIEL WEIL IN OPPOSITION.

BERNARD CAREY
State's Attorney of Cook County
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-7940
Attorney for Certain Respondents.

PAUL P. BIEBEL, JR.
Deputy State's Attorney
Chief, Civil Actions Bureau

JOHN A. DIENNER, III
Assistant State's Attorney
Of Counsel.

The Scheffer Press, Inc.—(312) 263-6850

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OPINIONS BELOW

The opinion of the District Court (App. A herein) is unreported. The opinion of the Court of Appeals for the Seventh Circuit, appended to Petitioner's Brief as

appendix A, contains several important typographical errors. The corrected appellate decision has not yet been published.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I. Does the complaint state a claim upon which relief may be granted as to any of these respondents?

II. Are defendants Hanrahan, Carey, Woods and Elrod immune from this civil damage action for acts within the scope of their authority?

III. Does 28 U.S.C. 1331 afford the Petitioner any remedy above and beyond those contained in 42 U.S.C. 1983?

IV. Is the issue of the constitutionality of Ch. 37 § 439.8 *Ill. Rev. Stat.* before this court on review?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are adequately set forth in the Petition except that Chap. 37 §439.8 *Ill. Rev. Stat.* is not before this court on review.

STATEMENT OF THE CASE

Petitioner's recitation of the statement of the case is substantially correct except that under Ch. 37 §4398 *Ill. Rev. Stat.* the limit of recovery for the wrongful imprisonment is approximately $5,000 per year in custody, not the $3,000 stated by petitioner.

ARGUMENT

I.

THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

The gist of the plaintiff's complaint is that because he was disbelieved by a jury in a murder trial he was thereby, *ipso facto,* denied various constitutionally protected rights, privileges or immunities. That simply is not and never has been the law. In essence, the plaintiff suggests that he was denied due process and therefore properly has this action. Due process requires only that these defendants afford this plaintiff that process which is legally due to him. If he receives that process the law has been met and he has no claim.

Nowhere in the United States or Illinois constitutions is there any requirement that the innocent prevail. Contrariwise, it is common-place for the known and admitted guilty to go free for a variety of reasons. While the system attempts to do substantial justice to all, there can be no guarantee that the guilty go to jail and the innocent go free. Guidelines are established by the courts and by statutes. Those which are legally binding on the system are the process which is due to the criminal defendant. The accused must be given an opportunity to meet the charges, present evidence and a multitude of other rights. But when those requirements have been met, or have been held to have been met by the courts, that is all that the system, manned by human beings, can do. When there is an absolute method of determining guilt, which is always correct, to permit less may deny due process, but such is not our present fortune.

Neither the various constitutions nor state and federal laws require or guarantee that only guilty persons be found guilty. That is the sought after result, to be sure, but it is neither mandated nor promised. It is obvious that a failure to do that which is not required cannot state a claim for relief under either 28 U.S.C. 1331 or 1334.

This court has long recognized the impossibility of providing every litigant a perfect trial. *Grannis* v. *Ordean,* 234 U.S. 385 (1914). So long as society must utilize human judges, attorneys, witnesses, litigants and jurors we will have to live with something less than the ideal. *Sproles* v. *Binford,* 286 U.S. 374 (1932) teaches that to make scientific precision a constitutional requirement would be to subject the state to intolerable supervision which would be hostile to the principles of our government and wholly beyond the protection contemplated by the 14th Amendment. *Powell* v. *Alabama,* 287 U.S. 45 (1932) held that the basic elements of the constitutional requirement of due process are notice and a hearing before a legally competent tribunal having jurisdiction of the case. This principle was further described in *Frank* v. *Mangum,* 237 U.S. 309 (1915), wherein the Court held that "due process of law" does not mean that the operations of state government shall be conducted without error or fault in any particular case but only that the defendant's fundamental rights shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such cases. Similarly, due process does not provide review of mere error in jury verdicts. *Lyons* v. *Oklahoma,* 322 U.S. 596 (1944). To the same effect is *Townsend* v. *Burke* (1947) 334 U.S. 736, which found that an erroneous judgment of a court in a criminal case, based

on a scrupulous and severe search for the truth, may yet amount to due process of law. *Donnelly* v. *DeChristoforo,* 416 U.S. 637 (1974) held that not even every trial error which might call for the application of an appellate court's supervisory powers necessarily demonstrates a failure to observe that fundamental fairness which is essential to the concept of justice.

Due process is satisfied when the defendant is present in court and is convicted after having been fairly advised of the charges and after a fair trial held in accordance with constitutional procedural safeguards, *Frisbie* v. *Collins,* 342 U.S. 519 (1952), or more simply stated, when he has had a fair opportunity to defend against the state charges. *Chambers* v. *Mississippi,* 410 U.S. 284 (1973). This court declared in *McGautha* v. *California,* 402 U.S. 183 (1971),

> "[T]he federal Constitution . . . does not guarantee trial procedures that are best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of This Court. The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected." 402 U.S. at 221

Recently, this Court concluded that the Fourteenth Amendment's due process clause does not *ex proprio vigore* extend to a person a right to be free of injury whenever the state may be characterized as the tortfeasor. That is, not every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishes a violation of the Fourteenth Amendment. *Paul* v. *Davis,* 424 U.S. 693 (1976), reh. den., 425 U.S. 985. Even more pointed is

the holding that the Fourteenth Amendment does not guarantee that all decisions by state officials will be correct. *Lavine* v. *Milne,* 424 U.S. 577 (1976).

It has been the law of this land since 1873 that "due process of law" means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. *Rees* v. *City of Watertown,* 86 U.S. 107 (1873) Petitioner herein has absolutely failed to point out any deficiency in the state criminal proceedings which would constitute a denial of due process. Rather, he argues that the erroneous jury verdict, *ipso facto,* constitutes a due process violation. That is not the law. He even admits due process compliance.

II.

RESPONDENTS HANRAHAN, CAREY, WOODS AND ELROD ARE ABSOLUTELY IMMUNE FROM THIS CIVIL DAMAGE SUIT.

Beyond the obvious deficiencies in the pleadings which fail to demonstrate that State's Attorneys Hanrahan and Carey personally participated in the Petitioner's prosecution,[1] it is well settled law that their mere status as elected officials fails to state a claim upon which relief may be granted. Had they personally participated in the prosecution, they would be immune from suit. *Imbler* v. *Pachtman,* 424 U.S. 409 (1976).

Two Sheriffs of Cook County, Illinois are named as defendants: Joseph I. Woods and Richard J. Elrod. No-

[1] Edward V.. Hanrahan was the elected State's Attorney of Cook County, Illinois from December 3, 1968 to and including December 4, 1972,. Bernard Carey is the present State's Attorney of Cook County, Illinois. He entered office on December 5, 1972.

where in the complaint are they alleged to have personally participated in any specific acts which allegedly caused the plaintiff injury. *Respondeat superior* is not an available doctrine by which to hold these defendants liable. It is now well established that personal participation must be alleged or the complaint is defective. *Rizzo* v. *Goode,* 423 U.S. 423 U.S. 362 (1976).

Ch. 125, §203(a) and (b), *Ill. Rev. Stat.,* sets forth statutory duties upon defendants Woods and Elrod to establish, operate and have jurisdiction over the Cook County Department of Corrections—the physical plant and the inmates therein. The plaintiff admits in his complaint he was arrested by the Chicago Police Department (paragraph 8, Complaint) and it is not alleged but assumed for the sake of this motion that he was then housed in the Cook County Department of Corrections, Division I. Such incarceration is by court order, a mittimus. Ch. 125, §16, *Ill. Rev. Stat.,* states:

> "The disobedience of any sheriff to perform the command of any writ, warrant, process, order, or decree legally issued to him shall be deemed a contempt of the court that issued the same. . . ."

The state law further prevails upon these defendants:

> "[T]he warden of the Jail shall receive and confine in such jail, until discharged by due course of law all persons who are committed to such jail by a competent authority." Ch. 75, §4, *Ill. Rev. Stat.*

Defendants Woods, Weil and Elrod had no discretion detaining the plaintiff and cannot now be liable for complying with their statutory duties. A public official acting pursuant to a court order, valid on its face, (here a mittimus) is immune from civil damage suits. *Pierson* v. *Ray,* 386 U.S. 547 (1967).

III.

28 U.S.C. 1331 AFFORDS THE PETITIONER NO REMEDIES ABOVE AND BEYOND THOSE CONTAINED IN 42 U.S.C. 1983.

The Cook County Department of Corrections is an assemblage of bricks, wash basins, steel bars and toilets: it neither acts nor fails to act and, of course, has not been accused of having committed any acts at all for rather obvious reasons. It is not a proper party defendant. The same goes for the plaintiff's claim against the County of Cook. First these defendants assert that the allegations contained in the complaint do not constitute a claim of denial of due process. But assuming, *arguendo*, to the contrary, these defendants are not proper parties defendant as they are not "persons."

Although plaintiff's Complaint is somewhat ambiguous as to the jurisdictional base for his action against the County of Cook, he apparently claims that jurisdiction is based under 28 U.S.C. §1343(a) (for a violation of 42 U.S.C. §1981) and under 28 U.S.C. §1331(a) (for violations of his rights under the Eighth and Fourteenth Amendments).

A county is not suable under 42 U.S.C. §1983. Plaintiff alternately claims that independent jurisdiction exists by virtue of 28 U.S.C §1331(a) for a violation of his rights under the Fourteenth Amendment. Plaintiff has cited below *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973) in support of his position. In *City of Kenosha* v. *Bruno*, the plaintiff sued two municipalities alleging jurisdiction under 28 U.S.C. §§1331 and 1343. Concerning the availability of jurisdiction under §1331, the Supreme Court stated:

> "We have had the benefit of neither briefs, arguments, nor explicit consideration by the District Court of the . . . availability of §1331 jurisdiction in view of the state of the record below." 93 S.Ct. at 2227.

The Court did not squarely decide the jurisdictional contention put forward by plaintiff here.

It is submitted that no jurisdiction should exist against a municipality under 28 U.S.C. §1331 for a violation of an individual's civil rights. The Seventh Circuit has agreed with this position in its decision below.

Prior to the enactment of the 1871 Civil Rights Act, 42 U.S.C. §1983, no remedy existed in the federal courts by which an individual could sue for damages for a violation of his civil rights. Certainly the Fourteenth Amendment and others created "constitutional rights;" but they did not contain remedies. Thus, no remedy or right to sue for monetary damages existed prior to the date upon which Congress, acting pursuant to Section 5 of the Fourteenth Amendment, enacted 42 U.S.C. §1983.

The legislative history of §1983 has been examined on numerous occasions by the Supreme Court. Most significantly, in *Monroe* v. *Pape*, 365 U.S. 167 (1961) the Court considered and rejected the contention that Congress had intended to bring municipal corporations within the ambit of §1983.

It is clear that the only means by which an individual may sue to secure monetary damages for a deprivation of his constitutional rights is when the Congress specifically creates by legislation such a remedy. *Moreover, 28 U.S.C. §1331 (a) does not create a remedy.* Rather, it is merely jurisdictional, providing a forum where remedies previously established by Congress can be adjudicated.

To this date, Congress has not seen fit to hold municipal corporations liable when an individual's rights are violated. If a liability does not exist under existing legislation

(in this case §1983), a plaintiff cannot circumvent Congress by fashioning a remedy from a purely jurisdictional enactment. A similar attempt was made by other plaintiffs in an attempt to recover attorneys' fees in "public interest" litigation where they were successful. They argued that while no federal statute permitted it, it was proper to do so under the federal doctrine that permits the fashioning of appropriate remedies. The Court rejected that argument: *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975)

Even assuming as a general proposition of law that the County of Cook can be held liable for alleged violations of an individual's rights, it is apparent that under the allegations in his Complaint the County cannot be held accountable to this plaintiff.

The single thread by which plaintiff is attempting to hold the County liable is an unpleaded, *inter linea* assumption that acts of certain county officers (Hanrahan, Carey, Elrod, Weil and Woods) deprived Plaintiff of his rights. Implicit in that claim is the contention that the County is liable under a *respondeat superior* theory. In that contention, plaintiff ignores the legal relationship between the County and the individual defendants, as well as the facts that the individuals are not agents of the County and the County is not their "superior."

Since December 1, 1969, the operation of the Cook County Jail has been the responsibility of the Cook County Department of Corrections. *Ill. Rev. Stat.*, Ch. 125, §201 *et seq.* The Board of said Department consists of five members, (§204), and it has the power and duty "to operate and have jurisdiction over the county jail." [§203 (a)]. The executive director of the Department is selected by the Sheriff from names submitted by the Board, and he can be removed only by the Board itself. Clearly, the

director is not the agent of the County of Cook because the County has no control over his activities. Thus, the County is not a "superior" to the director.

Similarly, guards at the Cook County Jail are not agents of the County of Cook. Rather, they are appointed, promoted, removed, and disciplined pursuant to regulations established by the Cook County Police and Corrections Merit Board, *Ill. Rev. Stat.*, Ch. 125, §52, *et seq.* Guards, of course, are also responsible to the Sheriff. However, there is no statutory authority for the proposition that the County of Cook has any authority to control the actions of a guard, the warden, or the director at the Department of Corrections. Thus, the County cannot be held accountable for those persons' acts.

Finally, it should be noted that the County has no control over the actions of Sheriffs Elrod and Woods and State's Attorneys Carey and Hanrahan. Those positions are established by the 1970 Illinois Constitution, and they are elected by the citizens of the County. They are responsible to those citizens, and perform within statutory guidelines. The County of Cook has no statutory authority to control the manner in which the Sheriff or the State's Attorney perform their statutory duties. Thus, they cannot be considered agents of the County, and the County cannot be said to be responsible for their actions.

It is submitted that if the County of Cook has neither the power to employ Elrod, Woods, Weil, Carey or Hanrahan, nor the power to control their actions, then the County cannot be held legally responsible for their actions or inactions. As such, plaintiff's Complaint fails to state a claim upon which relief can be granted against the County of Cook.

The Seventh Circuit's holding that the County of Cook cannot be made liable via 28 U.S.C. 1331 is entirely consistent with the applicable state law which is contained in Chapter 85, Section 2-109, *Ill. Rev. Stat.* which states:

> "A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable."

IV.

THE CONSTITUTIONALITY OF CHAPTER 37, SECTION 439.8, OF THE ILLINOIS REVISED STATUTES IS NOT BEFORE THIS COURT.

Plaintiff attempts to litigate for the first time on appeal the constitutionality of Chapter 37, Section 439.8 of the Illinois Revised Statutes. The constitutionality of this statute was never raised by the plaintiff in his complaint. Paragraph 20 of the complaint states that a claim has been filed in the Illinois Court of Claims pursuant to this statute.[2] Paragraph 21 of the complaint simply states the pleader's feelings that the limits prescribed by the statute are arbitrary. Paragraph 25 concludes the complaint by stating that limiting the plaintiff's recovery to the statutory rate defeats "overriding policy" and "due process considerations." The complaint is devoid of any request for declaratory relief and the complaint lacks a jurisdictional statement including 28 U.S.C. 2201. The complaint does not request a declaration concerning the constitutionality of the state statute. This would tend to explain why the District Court failed to rule upon the constitutionality of the statute. Similarly, no relief pursuant to 28 U.S.C. 2281 was sought. Hence, plaintiff's request for an advisory opinion concerning the statute ought properly be denied.

[2] Giving rise to these respondents' defense below of prior pending state claim.

CONCLUSION

These Respondents submit that the issues raised by Petitioner's appeal are insubstantial and do not justify plenary review by the Court.

Respectfully submitted,

BERNARD CAREY
State's Attorney of Cook County, Illinois
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-7940
Attorney for Respondents County of Cook, Edward Hanrahan, Bernard Carey, Joseph Woods, Richard Elrod, Department of Corrections of Cook County and Daniel Weil.

PAUL P. BIEBEL, JR.
Deputy State's Attorney
Chief, Civil Actions Bureau

JOHN A. DIENNER, III
Assistant State's Attorney
Of Counsel.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

WILBUR McDONALD,

Plaintiff,

vs.

STATE OF ILLINOIS, et. al.,

Defendants.

No. 75 C 2755

MEMORANDUM OF DECISION

This is a civil rights action brought by plaintiff pursuant to the provisions of 42 U.S.C. Section 1983. Jurisdiction in this Court is invoked under the provisions of 42 U.S.C. Section 1343. Plaintiff also alleges jurisdiction under the federal question provisions of 28 U.S.C. Section 1331. All of the parties named defendants herein have pleaded to plaintiff's complaint by way of motions for summary judgment or to dismiss the complaint. The case is presently before the Court for decision on the defendants' motions.

A reading of the complaint reveals the following allegations: Plaintiff was arrested by Chicago police officers on July 11, 1970, and was thereafter tried and convicted of murder by a jury on August 17, 1971. The trial took place in the Circuit Court of Cook County, Illinois, Criminal Division. In August 1973, one Lester Harrison confessed to the murder for which plaintiff had been convicted. Plaintiff was subsequently discharged after the Cook County States' Attorney had found sufficient information demonstrating the truth of Harrison's confession. Approximately one year later plaintiff was granted a full pardon "based on innocence" by the Governor of Illinois.

As a result of this conviction and incarceration, the complaint states that plaintiff was deprived of his freedom, of normal human society, and of all the usual and ordinary pursuits and benefits of life as a free man. The complaint further alleges numerous deprivations of rights and other wrongs perpetrated by the various defendants.

The complaint recites that plaintiff has filed an action in the Illinois Court of Claims for damages pursuant to Illinois Statutory provision (Ill. Rev. Stat. Ch. 37, Sec. 439.8(c)). The complaint maintains that the above-cited Illinois statute violates due process in that it places an arbitrary limit upon the value of an innocent person's wrongful incarceration. The complaint further asserts the curious, if not unsupportable, legal position that when a person is convicted and incarcerated for an offense of which he is in fact innocent, government officials "must have been responsible therefor; res ipsa loquitur. Upon such an allegation and proof of wrongful conviction and incarceration of an innocent man, defendants must establish that they were not responsible for said miscarriage of justice and for the resulting damages to plaintiff." (Par. 24, Complaint). The prayer seeks five million dollars in damages.

Defendant Conlisk, a former Superintendent of the Chicago Police Department, and defendant Rochford, the present Superintendent, have filed motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Both defendants have attached affidavits to their motion in which they assert that they exercised no direct supervision over certain other named defendants in this action, and, in effect, deny any personal involvement in the activities which gave rise to the plaintiff's complaint.

The Court notes at the outset that summary judgment under Rule 56(c) is to be applied with caution. *International Association of M. & A.W. Dist. No. 8* v. *Clark Company*, 471 F. 2d 694, 697 (7th Cir. 1972). It is incumbent that this Court examine all proffered materials

to determine whether there is a genuine issue of material fact to be tried. *Hazeltine Research, Inc.* v. *General Electric Co.*, 183 F. 2d 3 (7th Cir.1950). The granting of summary judgment, while a drastic remedy, is a wholesome one where applicable to the circumstances, and is never warranted except on a clear showing that no genuine issue as to any material fact remains for trial. *Mintz* v. *Mathers Fund, Inc.*, 463 F. 2d 495, 498 (7th Cir. 1972).

A reading of the complaint reveals that the names of Conlisk and Rochford are not even mentioned in any paragraph of the complaint. It appears that their only connection with this lawsuit is the fact that they are named as defendants in the caption of the case. In light of this failure to allege facts pertaining to these defendants, and in light of the requirement of an allegation of personal involvement on the part of public officials for the maintenance of a respondeat superior theory of liability, *Adams* v. *Pate*, 445 F. 2d 105 (7th Cir. 1971), the Court finds that the pleadings, memoranda, and affidavits present no genuine issue as to any material fact. Accordingly, the motion for summary judgment of defendants Conlisk and Rochford is granted.

Defendant Hanrahan, the former Cook County, Illinois, State's Attorney, and defendant Carey, the present State's Attorney, have filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12 (b)(6), F.R.C.P. A complaint, of course, should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45, 46 (1957). For purposes of entertaining a motion to dismiss, the Court treats the allegations of the complaint as true. *Gardner* v. *Toilet Goods Association*, 387 U.S. 167, 172 (1967).

It is a fundamental principal that a prosecuting attorney, acting within the scope of his office as provided

by statute, enjoys the same cloak of immunity from civil liability as a judge. See *Cawley* v. *Warren,* 216 F. 2d 74 (7th Cir. 1954). Inasmuch as the complaint fails to allege that defendants Hanrahan and Carey somehow acted outside the scope of their authority as set forth in *Ill. Rev. Stat.* Ch. 14, Sec. 5 and its statutory predecessor, and since the rule of judicial immunity precludes the possibility of holding these defendants liable for the prosecution of the plaintiff, the motion of defendants Carey and Hanrahan to dismiss is hereby granted.

Defendant Woods, the former Sheriff of Cook County, defendant Elrod, the present Sheriff, and defendant Weil, the former Superintendent of the Cook County Department of Corrections, have also filed motions under Rule 12 (b)(6) to dismiss the complaint. The Court notes that there must be an allegation of defendants' personal involvement in the alleged deprivation of plaintiff's federally protected rights. *Adams* v. *Pate, supra,* in order to impose vicarious liability on those defendants under the theory of *respondeat superior.* Furthermore, Illinois law provides for the duties of the office of Sheriff (*Ill. Rev. Stat.* Ch. 125) and the duties of the Warden (*Ill. Rev. Stat.,* Ch. 75), and it is a well recognized principle that a public official, acting pursuant to a court order, is immune from civil damage suits. See *Robinson* v. *McCorkle,* 462 F. 2d 111 (3rd Cir. 1972), and cases cited therein. In the instant case, the complaint contains no allegations as to defendants Woods and Elrod, and in light of the foregoing reasons, their motion to dismiss is hereby granted.

As to defendant Weil, the complaint alleges that this defendant refused to allow plaintiff's attorney to photograph the plaintiff shortly after his arrest in order to corroborate testimony that the plaintiff had been beaten by unknown assailants, accounting for his presence near the scene of the homicide. The Court finds that such an allegation, even if proven, is insufficient to state a claim upon which relief can be granted. Defendant Weil, as

Superintendent of the Cook County Department of Corrections, is vested with authority to promulgate such rules and regulations as he deemed proper for the administration of the institutions over which he exercised control. As such, a corrections official's refusal to allow plaintiff's attorney to photograph the plaintiff is not a deprivation of right which rises to such a dimension as to be cognizable under the Civil Rights Act of 1871 Accordingly, as to defendant Weil, the motion to dismiss is hereby granted.

Defendants Arnos and Saternos of the Chicago Police Department have also presented a motion to dismiss based on their assertion that the action is barred by the statute of limitations (*Ill. Rev. Stat.* Chapter 83, Sec. 15). Although this Court makes no ruling on whether the applicable statute of limitations bars this action as to these defendants, the Court does find that the allegations of the complaint are insufficient to state a claim against Arnos and Saternos. The complaint alleges that these defendants refused to "discuss facts they knew prior to their testimony," and that they failed to properly report their initial encounter with the plaintiff. The Court finds these allegations are not sufficient to state a claim upon which relief can be granted. Accordingly, as to defendants Arnos and Saternos, the motion to dismiss is hereby granted.

Also named as defendants in this action are the State of Illinois, the City of Chicago, the County of Cook and the Department of Corrections of Cook County, Illinois. All of these defendants are governmental units for which the various individually named defendants acted as agents or executives. In light of this Court's decision that the motions for summary judgment or to dismiss the complaint should be decided in favor of the various named individual defendants, and in light of the fact that the governmental unit defendants could only be held liable if the individual defendants could be held liable, the motion to dismiss the above named governmental unit defendants is hereby granted.

In conclusion, the Court notes that the entire thrust of plaintiff's complaint is a pleading of wrongful conviction. Plaintiff seems to assert that the fact of the existence of a conviction of an innocent person creates a cause of action under the Civil Rights Act of 1871, or creates a cognizable constitutional deprivation under federal question jurisdiction, and that merely because the fact of wrongful conviction exists, the named defendants must adduce proof that they were not legally responsible for the conviction and resulting damage. Although deeply sympathetic to plaintiff's unfortunate conviction, the Court finds plaintiff's theory legally untenable. Accordingly, for the reasons expressed herein, the complaint must be and hereby is dismissed.

/s/ William J. Lynch
Judge, United States District Court

Dated: Jan. 22, 1976

Supreme Court, U. S.
FILED
NOV 9 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-399

WILBUR McDONALD,

Petitioner,

vs.

STATE OF ILLINOIS, CITY OF CHICAGO, COUNTY OF COOK, EDWARD V. HANRAHAN, BERNARD M. CAREY, JOSEPH WOODS, RICHARD ELROD, DEPARTMENT OF CORRECTIONS OF COOK COUNTY, DANIEL WEIL, JAMES ROCHFORD, JAMES CONLISK, and WILLIAM ARNOS and GERALD SATERNOS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS CITY OF CHICAGO, ROCHFORD, CONLISK, ARNOS AND SATERNOS

WILLIAM R. QUINLAN,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago, Illinois 60602,
Counsel for Respondents, City of Chicago, Rochford, Conlisk, Arnos and Saternos.

DANIEL PASCALE,
EDMUND HATFIELD,
Assistant Corporation Counsel,
Of Counsel.

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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STATEMENT

This brief in opposition is presented on behalf of the City of Chicago respondents—the City of Chicago, a municipal corporation, itself, James Rochford and James Conlisk, both former superintendents of the Chicago Police Department, and Chicago patrolmen William Arnos and Gerald Saternos.

The petitioner, Wilbur McDonald, has brought this civil rights action pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment to the Constitution.

The complaint alleges that the petitioner was arrested by Chicago police officers on July 11, 1970, on suspicion of murder. It is further averred that McDonald was subsequently indicted on a charge of murder, tried on that charge before a jury in the Circuit Court of Cook County, Illinois, and convicted of murder on August 11, 1971. He was sentenced to the penitentiary for 100 to 150 years and was incarcerated there until August, 1973, when another person confessed to the crime. McDonald was granted a new trial and all charges were then nolle prossed. He alleges he later received a full pardon from the Governor of Illinois on the ground of innocence. The complaint declares that McDonald "was unjustly imprisoned from July 11, 1970, to August 15, 1973, a total of three years and 35 days."

However, the involvement of the Chicago Police Department in this chain of events was limited to arresting McDonald on July 11, 1970, and immediately transferring him to the custody of the Sheriff of Cook County. Patrolmen Arnos and Saternos, furthermore, were not the arresting officers. McDonald's grievance against Officers Arnos and Saternos is that they did not

make a report to the police department of an interview they had with him in the park shortly before his arrest by other officers. Petitioner claims he told Arnos and Saternos that he had just been robbed. McDonald argues that if they had reported this, it would have corroborated his alibi.

The district court dismissed petitioner's action on the ground that a municipality is not subject to suit under the Civil Rights Act. *Monroe v. Pape*, 365 U.S. 167, at 187-191 (1961). A motion for summary judgment was also entered in favor of the two former superintendents of police, respondents Rochford and Conlisk, on the ground that the doctrine of respondeat superior has no application between a public officer and his subordinates in the public service, unless the superior officer directs, countenances or cooperates in the tortious act. The district court dismissed the allegations as to respondents Arnos and Saternos as insufficient to state a claim against them.

The court of appeals affirmed this judgment with respect to all the City of Chicago respondents (Petition for Certiorari App., pp. 82, 92, 112, 122, 132).

ARGUMENT

The petition for certiorari filed by Wilbur McDonald fails to assert, argue or even mention that the judgment below is in any way erroneous insofar as relates to the City of Chicago respondents.

The questions presented for review by the petition (pp. 2,3) concern only the State of Illinois.

Rule 23(1)(c) of the Rules of the Court provides:

> "Only the questions set forth in the petition or fairly comprised therein will be considered by the court,"

As Justice Jackson stated in *Irvine v. California*, 347 U.S. 128, at 129,

> "The issues here are fixed by the petition . . ."

The judgments of the district court and the court of appeals with respect to the City of Chicago respondents are obviously correct and the petitioner has tacitly conceded this.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari, insofar as it relates to the City of Chicago respondents, should be denied.

Respectfully submitted,

WILLIAM R. QUINLAN,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago, Illinois 60602,
Counsel for Respondents, City of Chicago, Rochford, Conlisk, Arnos and Saternos.

DANIEL PASCALE,
EDMUND HATFIELD,
Assistant Corporation Counsel,
Of Counsel.

November 8, 1977